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No. _____

In The

Supreme Court of the United States

October Term, 1997

THE STATE OF TEXAS,

Petitioner,

vs.

BRUCE FERNANDEZ,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals For The Fourth Court Of Appeals District Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Texas courts have misconstrued the decisions of *Burks v. United States*, *Greene v. Massey*, and *Tibbs v. Florida* by ordering an acquittal when the conviction is reversed on appeal solely due to the failure to sufficiently corroborate accomplice witness testimony, a clear state-law requirement that does not constitute an element of the offense.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Court of Appeals District of Texas.

OPINION BELOW

The opinion of the Court of Appeals has been designated for publication, but has yet to be reported. It is reproduced in the Appendix at 1. The order of the Court of Appeals designating the opinion for publication is in the Appendix at 50.

JURISDICTION

The Court of Appeals issued its opinion and judgment on January 21, 1998. The State timely filed a motion for rehearing on January 30, 1998, which was overruled on February 18, 1998. The State timely filed a petition for discretionary review on February 19, 1998. The Court of Criminal Appeals refused the petition on July 8, 1998. Jurisdiction in this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States, in pertinent part:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

Vernon's Ann.C.C.P. art. 38.14 (Vernon 1979):

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

V.T.C.A., Penal Code § 29.02, in pertinent part:

> (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
>
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

V.T.C.A., Penal Code § 29.03, in pertinent part:

> (a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:
>
> (1) causes serious bodily injury to another;
>
> (2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(A) 65 years of age or older; or

(B) a disabled person.

STATEMENT OF THE CASE

The evidence

The appellant, Bruce Fernandez, was charged in a simple indictment with two counts of aggravated robbery. A jury found the appellant guilty and his punishment was assessed at 20 years imprisonment on each count. On original submission, the Court of Appeals sustained the appellant's first point of error, in which he alleged that the trial court erred in denying his motion for an instructed verdict of not guilty because the State failed to corroborate the testimony of an accomplice witness.

The opinion below; how the federal issue was raised

Having found the evidence insufficient to sustain the conviction, because of the failure to corroborate accomplice testimony, pursuant to the perceived mandate of *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), the Court of Appeals ordered an acquittal to be entered for each count.

The State's motion for rehearing in the Court of Appeals argued that the court had made an improper

disposition by ordering entry of an acquittal, instead of remanding the case for a new trial. The motion was overruled without opinion. App. 14 thru 29.

The State's petition for discretionary review to the Court of Criminal Appeals likewise contended that the Court of Appeals incorrectly applied federal constitutional principles by ordering entry of an acquittal. The State's petition was refused. App. 31 thru 50.

REASONS FOR GRANTING THE WRIT

This case presents an important issue of federal law that will have sweeping application across numerous jurisdictions in this country. The courts of the state of Texas, as well as those of several other states, have been ordering that acquittals be entered in cases where the courts have determined the evidence to have been insufficient, not because the evidence failed to comply with constitutional sufficiency requirements, but instead, solely due to reasons of state law – i.e., that there was a failure to corroborate the testimony of an accomplice witness according to a state-law requirement.

Although these courts have held the evidence to be insufficient on state-law grounds, they have also held that in such cases, the federal Double Jeopardy Clause mandates an acquittal in such cases, pursuant to this Court's decisions in *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). We perceive the misunderstanding of the applicable principles to be due in large part to the fact that the Court has never

clearly enunciated the specific standard by which the evidence is to be gauged before federal double jeopardy principles are implicated. Even in its decision in *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982), while holding that the Florida standard governing the weight of the evidence did not trigger a double jeopardy bar to reprosecution, the Court did not expressly pronounce what constitutes the applicable standard.

The various courts across the nation need this guidance from the Court.

I. The Court of Appeals for the Fourth Court of Appeals District of Texas has decided an important question of federal law that has not been, but should be, settled by this Court, to-wit: What is the applicable standard by which the sufficiency of the evidence should be determined in order to trigger the prohibition against reprosecution pursuant to the Double Jeopardy Clause?

In *Burks v. United States, supra*, and *Greene v. Massey, supra*, this Court held that when the evidence is determined to be legally insufficient to sustain the conviction, the Double Jeopardy Clause precludes reprosecution for that offense. However, what has not been expressly articulated is the standard to be employed to determine when the State's evidence is so deficient that a retrial is barred. Is the standard the minimal due process standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)? Or, is it enough that the State's evidence failed to comply with a *state law* that governs the authority to convict? Or, instead, is the standard at some point in between?

In *Jackson v. Virginia, supra,* the Court held that the evidence would be considered sufficient to meet due process requirements if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. And, in both *Burks* and *Greene,* it is clear that this Court was considering situations in which the State's evidence failed to comply with that standard. What is not clear from *Burks* and *Greene* is whether the Court was limiting its holding to such inadequacies in the prosecution's evidence, or whether that just happened to be the circumstances presented in those cases.

While we are not aware of any definitive holding by the Court on this issue, we believe that the appropriate standard is the minimal due process requirement of *Jackson v. Virginia.* If that conclusion is correct, then the State's evidence in this case is not legally insufficient according to federal law, such that a double jeopardy bar to reprosecution would be triggered, because a corroboration requirement of accomplice testimony, such as that contained in Vernon's Ann.C.C.P. art. 38.14, is not required by the United States Constitution in order to meet minimal due process requirements. *See, Caminetti v. United States,* 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917).[1] *See also, Thompson v. State,* 691 S.W.2d 627 (Tex. Crim. App. 1984), cert. den., 474 U.S. 865, 106 S.Ct. 184, 88 L.Ed.2d 153 (1985).

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[1] It is also significant that Art. 38.14 does not speak in terms of an "acquittal." Instead, it reads "[a] conviction cannot be had. . . . " Therefore, the requirement of that statute cannot be considered as an element of the offense; nor can a reversal on appeal for failure to comply with Art. 38.14 be considered as an implied acquittal of the offense.

II. The Court of Appeals for the Fourth Court of Appeals District of Texas has decided an important federal question in a way that conflicts with relevant decisions of this Court, i.e., that where a conviction is reversed on appeal because of insufficient evidence, due solely to the failure to sufficiently corroborate accomplice testimony, the proper remedy is the entry of an acquittal and a double jeopardy bar to reprosecution.

The conclusion that a failure to meet a state-law requirement that accomplice testimony be corroborated does not result in a jeopardy bar to reprosecution is buttressed by the Court's decision in the case of *Tibbs v. Florida, supra*. At the time, a Florida appellate rule authorized an appellate court to review the evidence in a death sentence case to determine if the interests of justice required a new trial, regardless of whether the insufficiency of the evidence was a ground of appeal. Pursuant to that rule, the Florida Supreme Court had determined in *Tibbs* that, although the evidence was legally sufficient to meet the requirements of *Jackson v. Virginia*, weaknesses in the prosecution's evidence required a new trial in the interests of justice. This Court ruled that when an appellate court so concludes that a guilty verdict is against the *weight* of the evidence, as opposed to being legally *insufficient*, the Double Jeopardy Clause does not bar the prosecution from a retrial.

Although the Court again, as in *Burks* and *Greene*, was not explicit regarding the applicable standard of evidentiary insufficiency necessary to invoke a double jeopardy bar to retrial, the implications from the Court's language support the conclusion that it is the *Jackson v.*

Virginia legal insufficiency standard that is to apply. First, this Court stated in the following language the holding of the Florida Supreme Court that it was to review, and ultimately affirm:

> Having found that it could not "fairly conclude . . . that Tibbs' convictions were reversed on the grounds of evidentiary insufficiency," *id.*, at 1127, the Florida Supreme Court held that *Greene* and *Burks* do not bar retrial. Those decisions, the court believed, as well as *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), interpret the Double Jeopardy Clause to preclude retrial after reversal of a conviction only when the appellate court has set the conviction aside on the ground that the evidence was legally insufficient to support conviction. Other reversals, including those based on the weight of the evidence or made in the "interests of justice," do not implicate double jeopardy principles.

Tibbs v. Florida, 457 U.S. at 39, 102 S.Ct. at 2216, 72 L.Ed.2d at 659.

Also, the Court described its previous holdings in *Burks* and *Greene* in the following manner:

> *Burks v. United States* and *Greene v. Massey* carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial. In those cases, we held that the Double Jeopardy Clause precludes retrial "once the reviewing court has found the evidence legally insufficient" to support conviction. This standard, we explained, "means that the government's case was so lacking that it should not have even been *submitted* to the

> jury." *Burks*, 437 U.S., at 16, 98 S.Ct., at 2149 (emphasis in original). A conviction will survive review, we suggested, whenever "the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. In sum, we noted that the rule barring retrial would be "confined to cases where the prosecution's failure is clear." *Burks, supra*, at 17, 98 S.Ct., at 2150.

Tibbs v. Florida, 457 U.S. at 40-41, 102 S.Ct. at 2217, 72 L.Ed.2d at 660-61. (Citations omitted).

Moreover, the Court in *Tibbs* made specific reference to the Due Process Clause's standard of evidentiary sufficiency decided in *Jackson v. Virginia*. This reference was made in response to the petitioner's contention that a distinction between the weight and the sufficiency of the evidence would undermine the *Burks* rule by encouraging appellate judges to base reversals on the weight, rather than the sufficiency, of the evidence. The context in which this reference was made is also an indication that the Court was making a distinction, for purposes of double jeopardy, between cases determined to be deficient due to evidentiary weight or due to legal insufficiency, and that it considered the *Jackson v. Virginia* threshold as the mark for any triggering of double jeopardy limitations on reprosecution. *Tibbs v. Florida*, 457 U.S. at 44-45, 102 S.Ct. at 2219-20, 72 L.Ed.2d at 663.

Any ambiguity regarding the appropriate standard of evidentiary insufficiency that might persist from the majority opinion in *Tibbs* is allayed by Justice White's dissenting opinion in the case. Justice White believed the

"trump card" in this analysis to be the court's assertion in *Burks* that the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. According to Justice White, since either situation, whether it involved evidence deemed legally insufficient under the federal due process standard or evidence determined to be inadequate on state law grounds, involved the failure of the State to present evidence adequate to sustain the conviction, the double jeopardy implications of each situation should be the same. Obviously, the majority of the Court rejected this interpretation. However, more important to the issue in this case is Justice White's assertion of what the court's majority was holding. To illustrate this point, we quote at length from portions of the dissenting opinion:

> The majority concedes, as it must under *Burks, supra*, that if the State's evidence failed to meet the federal due process standard of evidentiary sufficiency, the Double Jeopardy Clause would bar reprosecution. The majority fails to explain why the State should be allowed another try where its proof has been held inadequate on state-law grounds, when it could not do so were it inadequate on federal-law grounds.
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> * * *
>
> The majority offers two arguments in its attempt to distinguish the two cases. First, it emphasizes that the Double Jeopardy Clause "attaches special weight to judgments of acquittal." . . . Second, the majority thinks it to be of some significance that when the evidence is

> determined to be insufficient as a matter of federal law, then no rational factfinder could have voted to convict on that basis. On the other hand, when the conviction is reversed on the basis of the state-law rule applying a "weight of the evidence" test, that "does not mean that acquittal was the only proper verdict." *Ante*, at 2218. The constraints of the Double Jeopardy Clause, however, do not depend upon a determination that an "acquittal was the only proper verdict." The fact remains that the State failed to prove the defendant guilty in accordance with the evidentiary requirements of state law.
>
> * * *
>
> . . . That the proof fails on state-law, rather than federal-law grounds is immaterial to these policy considerations.

Tibbs v. Florida, 457 U.S. at 48-50, 102 S.Ct. at 2222-23, 72 L.Ed.2d at 665-67 (White, J., dissenting).

Justice White certainly understood the majority of the Court in *Tibbs* to be making the relevant distinction between cases determined to be inadequate on federal-law grounds, i.e., legal insufficiency of the evidence, and those held inadequate on state-law grounds.

Additional support for the proposition that double jeopardy implications arising from an insufficiency of the evidence are to be governed by the federal due process standard of *Jackson v. Virginia* can be found in the language utilized by this Court in other decisions. For example, in *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), which was handed down the same day as were *Burks* and *Greene*, the Court was interpreting a

federal statute which prohibited appeals by the government of the dismissal of an indictment if the Double Jeopardy Clause prohibited further prosecution. There, the Court said:

> . . . Despite respondent's contentions, an appeal is not barred[2] simply because a ruling in favor of a defendant "is based upon facts outside the face of the indictment," *id.*, at 348, 95 S.Ct., at 1024, or because it "is granted on the ground . . . that the defendant simply cannot be convicted of the offense charged," *Lee*, 432 U.S., at 30, 97 S.Ct., at 2146. Rather, a defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correctly or not, of some or all of the factual elements of the offense charged," *Martin Linen, supra*, 430 U.S., at 571, 97 S.Ct., at 1355. Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed.Rule Crim.Proc. 29, appeal will be barred only when "it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." 430 U.S., at 572, 97 S.Ct., at 1355.

United States v. Scott, 437 U.S. at 96-97, 98 S.Ct. at 2197, 57 L.Ed.2d at 78.

In other decisions, this Court has indicated that the threshold of evidentiary insufficiency established in *Burks* for precipitating double jeopardy implications is *legal insufficiency* of the evidence. *See, e.g., Hudson v. Louisiana,*

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[2] In other words, there is no double jeopardy bar to reprosecution.

450 U.S. 40, 43, 101 S.Ct. 970, 972, 67 L.Ed.2d 30, 33-34 (1981); *Smalis v. Pennsylvania*, 476 U.S. 140, 142, 106 S.Ct. 1745, 1747, 90 L.Ed.2d 116, 120-21 (1986). Moreover, there does not appear to have been any dispute on the Court regarding this principle. Justice Brennan, in his dissenting opinion in *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 104 S.Ct. 1805, 80 L.Ed.2d 311 (1984), characterized the standard required to invoke a double jeopardy bar to reprosecution as one of "constitutional insufficiency":

> The decision in *Burks*, therefore, is not merely an application of an abstract concept of "continuing jeopardy." Instead, *Burks* derives from "[p]erhaps the most fundamental rule in the history of double jeopardy jurisprudence" – that a " 'verdict of acquittal . . . [can]not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.' " . . . Unlike a reversal for trial error, a reversal for constitutionally insufficient evidence represents a determination that, notwithstanding the verdict to the contrary, no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 450 (1979), and therefore the defendant was *entitled* to a judgment of acquittal as a matter of law.
>
> * * *
>
> Because the first trial has plainly ended, "retrial is foreclosed by the Double Jeopardy Clause if the evidence fails to satisfy the [constitutional standard for sufficiency]. Hence, the [sufficiency] issue cannot be avoided; if retrial is to be had, the evidence must be found to be legally sufficient, as a matter of federal law, to sustain the jury verdict."

Id., 466 U.S. at 318-22, 104 S.Ct. at 1818-20, 80 L.Ed.2d at 331-32. (Brennan, J., dissenting).

The above-cited language from *United States v. Scott*, together with the Court's language utilized in other decisions, represents a further indication that the effect of this Court's decisions in *Burks* and *Greene* is that in order to invoke a double jeopardy bar to reprosecution, the prosecution's evidence must fail to meet the due process requirements for legal sufficiency, and not just fail for reasons unrelated to a determination of the insufficiency of proof of the factual elements of the offense.

DECISIONS FROM OTHER JURISDICTIONS

Although the state courts of Texas have been by far the most prevalent in ordering acquittals because of a failure to corroborate accomplice testimony, such decisions are not limited to that jurisdiction. Several courts of other states have ruled similarly. In addition, two federal circuit courts of appeals have held that insufficiency of the evidence due to a failure to corroborate accomplice testimony constitutes a double jeopardy bar to reprosecution.[3] A compilation of cases in which the courts have so ruled is attached hereto. App. 66, 67.

[3] In one of the federal cases, *DuBois v. Lockhart*, 859 F.2d 1314 (8th Cir. 1988), the court did consider the effect of this Court's decision in *Tibbs* upon the disposition of the case. However, in response to the State's contention that the

CONCLUSION

An acquittal of a charge where the conviction is determined to be supported by insufficient evidence, due solely to the failure to sufficiently corroborate accomplice testimony, is not a proper application of the federal double jeopardy principles first pronounced in *Burks* and *Greene*. Instead of the evidence in this case failing to meet the minimal due process requirements of *Jackson v. Virginia*, it is more akin to the evidence determined to be lacking in sufficient *weight* in *Tibbs v. Florida*. In order to meet the requirements of *Jackson v. Virginia*, it would only be necessary that any rational juror find the elements of the offense to have been proven beyond a reasonable doubt, without regard to any corroboration of an accomplice witness. However, Vernon's Ann.C.C.P. art. 38.14 constitutes an additional state-created standard that governs the *weight* of the evidence sufficient to convict. Thus,

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requirement that accomplice testimony be corroborated was not an element of the offense, the Court of Appeals reasoned that the question was not whether corroborated accomplice testimony was an element of the crime but whether it affected the proof required for the conviction. And, according to the court, under Arkansas law, such compliance was necessary for the conviction. *Id.* at 1317-18. However, the same could have been said of the Florida rule at issue in *Tibbs*. Although not considered to be an element of the offense, the sufficiency of the evidence pursuant to the Florida statute was just as necessary to the conviction of *Tibbs* as was the Arkansas statute requiring corroborated accomplice testimony in *DuBois*. The relevant distinction that should have been employed by the Court of Appeals in *DuBois* is that compliance with the Arkansas statute requiring corroborated accomplice testimony was not necessary to meet the legal sufficiency standard of *Burks* and *Greene*, in the same manner that compliance with the Florida statute governing the weight of the evidence was not necessary in *Tibbs*.

the situation in this case would not be determined by the principle referred to by the Supreme Court in *Burks* that an acquittal, no matter how erroneous, would be afforded absolute finality. As such, the appellate court's determination of evidentiary insufficiency in this case would be the same as an appellate court's determination of insufficient weight of the evidence to support the conviction, pursuant to the Court's decision in *Tibbs v. Florida*. In neither case should the reviewing court's determination that the evidence is insufficient to support the jury's verdict constitute a double jeopardy bar to reprosecution.

PRAYER

Petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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Fourth Court of Appeals District of Texas
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* * * (Logo) * * *

OPINION
Appeal No. 04-96-00185-CR

Bruce **FERNANDEZ,**
Appellant

v.

The **STATE** of Texas,
Appellee

From the 227th Judicial District Court,
Bexar County, Texas
Trial Court No. 95-CR-0391
Honorable Mike Machado, Judge Presiding

Opinion by: John F. Onion, Jr., Justice

Sitting: Phil Hardberger, Chief Justice
Catherine Stone, Justice
John F. Onion, Jr., Justice[1]

Delivered and Filed: January 21, 1998

REVERSED AND ACQUITTAL ORDERED

This appeal stems from convictions on two counts of aggravated robbery alleged in a single indictment. After the jury found appellant Bruce Fernandez guilty, punishment was assessed at 20 years' imprisonment on each count. The sentences were ordered to run concurrently.

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[1] Assigned to this case by the Chief Justice of the Supreme Court of Texas.

Appellant advances eight points of error. Initially, appellant contends that the trial court erred in denying his motion for an instructed verdict of not guilty because the State failed to corroborate the testimony of the accomplice witness as required by law. *See* TEX. CODE CRIM. PROC. 38.14 (Vernon 1979). Such contentions are now considered as challenges to the sufficiency of the evidence to sustain the conviction. *See Cook v. State*, 858 S.W.2d 467, 469-70 (Tex. Crim. App. 1993).

Under the appellate record before this court, we conclude that the first point of error must be sustained. We need not enumerate the other points of error.

Facts

Rudy Ybarra was the State's first witness. He had pleaded guilty to robbery, and the trial court was to later instruct the jury that Ybarra was an accomplice witness as a matter of law.

Ybarra and appellant were together on the afternoon of October 20, 1994. About 9:30 p.m., Jerry Lopez and Carlos Garibay came by appellant's house and the foursome left in Lopez's blue Dodge Dynasty automobile and drove out on U.S. 281. According to Ybarra, appellant and Garibay began talking about "jacking" or robbing someone. The group began to follow a pickup truck whose tire rims attracted their attention. Garibay handed a gun to appellant. The truck was followed into a neighborhood near Marbach Street. The individuals in the truck got inside their house before appellant and his companions arrived.

The group then drove down Broadway into Alamo Heights where two Cadillac automobiles were spotted driving ahead of the Dodge. Appellant stated that he wanted to rob the owners of one of the Cadillacs. Lopez followed one of the Cadillacs up the Austin Highway and then onto Sheraton Street where the Cadillac turned into a driveway. Ybarra revealed that appellant got out of the Dodge and sneaked up to the Cadillac and waited for the occupants to get out. Appellant was wearing dark clothing and had a cap on his head and a bandana around his face. Ybarra saw appellant pointing the gun at a man and a woman as they were exiting their vehicle.

Ybarra explained that he and the others decided to leave appellant when they saw a police car pull onto Sheraton Street. When they stopped at a stop sign, appellant jumped into the car with the gun and a purse. As he did, the gun discharged, and Lopez was hit in the neck. Appellant jumped out of the Dodge and said "Y'all don't know me." At this time, the gun in appellant's hand discharged again, and appellant ran off.

After appellant fled, the wounded Lopez managed to pull onto the Austin Highway, and Garibay grabbed the wheel of the Dodge and brought it to a stop. A nearby San Antonio Police officer was flagged down and assistance was requested for Lopez who was bleeding from the neck and coughing up blood. EMS arrived to care for Lopez. By this time, the Terrell Hills Police arrived and informed the other officers that the three men had been involved in a robbery. Ybarra and Garibay were then arrested. Lopez did not survive.

Diana Morehouse testified that on the night of October 20, 1994, she and her husband were returning home from a charity event in their 1993 Cadillac. As they pulled into the garage at their home and exited their car, a man, waving a gun, ran into the driveway and yelled: "Give me your money, you m___ f___." She gave the assailant her purse which was later recovered from Lopez's car.

Mrs. Morehouse was unable to see the assailant's face as he was wearing a dark knitted cap and something around his face. She noticed that he had a slender build, was about five feet, seven or eight inches tall and had olive colored skin. The man ran and the witness then heard what she thought were shots. She did not see the car as she was terrified and trying to get into her home. Mrs. Morehouse did not know appellant and could not identify him as the robber though appellant was approximately the same size and build.

Jeffrey Morehouse basically reiterated the events revealed by his wife. He described the armed robber as being masked and being a little taller than he was. The man seemed to have a Hispanic accent. Morehouse gave the robber a gold money clip with three or four hundred dollars and saw his wife give the man her purse. He described the getaway car as being a blue or gray four door vehicle. Morehouse also described how the robber got in the back passenger seat of the vehicle containing three other people but he couldn't estimate their size. Morehouse heard two shots fired. He immediately went inside his home and called 911. Morehouse was taken by the police to the location where the Dodge had come to a stop. Morehouse was unable to identify Lopez, Ybarra, or Garibay as the robber. Morehouse and Officer Bennett

then searched the area near Sheraton Morningside, and Austin Highway where Morehouse heard shots being fired. They found a nine millimeter semi-automatic handgun.

At trial, Morehouse testified that he did not know appellant and could not identify him as the robber. When asked if appellant was the same size and build, he answered: "I would say he's along the same. I would assume he's a few inches taller than I am and about the right build. But as to whether – that's about all I could say."

Terrell Hills Police Sergeant Andres DeLeon testified that about 11:40 p.m. on the night in question he was in a parking lot on Austin Highway sitting in his police vehicle when he saw a Cadillac being followed by a blue four door Dodge with its headlights off. In a few minutes he followed the cars. As he approached Sheraton and Morningside, he saw a slim built young man about five feet, seven or eight inches tall, running from the Morehouse house. While searching for this individual he received a dispatch about the robbery and went to the Morehouse house. On his way he saw the blue Dodge but continued to the house as directed. While talking to Morehouse, DeLeon received a dispatch about the Dodge being stopped on Austin Highway. DeLeon went to that location and saw the three suspects. He described Garibay as being five feet, ten or eleven inches tall, stout, weighing between 200 and 220 pounds with collar-length hair. Ybarra was described as weighing between 280 and 300 pounds. Lopez was described as being five feet, ten or

eleven inches tall and weighing 180 to 190 pounds. Sergeant DeLeon identified a bandana as having been recovered from the back pocket of Garibay's pants.

Terrell Hills Police Detective Donald Davis recovered a 9 millimeter shell case from the Dodge and took charge of the handgun found by Officer Bennett and Morehouse. He revealed that the weapon was jammed when found. No attempt was made to lift fingerprints from the weapon.

Richard Stengel, a firearms examiner, testified that the bullet recovered from Lopez's body, and the spent shell casing found in the car, were fired from the gun that was recovered.

Detective Davis took a written statement from appellant which was introduced before the jury. In the statement, appellant admitted that he and Ybarra were walking to Ybarra's home about 8:00 p.m. on October 20, 1997, when they were picked up by Lopez and Garibay driving a blue Dodge. They went to a convenience store because Ybarra was hungry. On the way, Garibay gave appellant a 9 millimeter pistol and said he wanted to sell it. After examining the weapon, appellant returned it to Garibay as he did not know anyone interested in purchasing a gun. After leaving the convenience store, appellant claimed he was taken home, that he talked to his sister, and then went to bed. He did not awaken until 10 or 11 o'clock the next morning.

Sufficiency of the Corroboration

Appellant, in his first point of error, contends that the evidence is insufficient to corroborate the testimony of the accomplice witness as required by article 38.14 and that his convictions cannot stand.

The standard for reviewing the legal sufficiency of the evidence is whether, viewing the evidence in the light most favorable to the jury's verdict, any rational trier of fact could have found beyond a reasonable doubt the essential elements of the offense charged. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Villalon v. State*, 791 S.W.2d 130, 132 (Tex. Crim. App. 1990); *Skillern v. State*, 890 S.W.2d 849, 879 (Tex. App. – Austin 1994, pet. ref'd). The standard of review is the same in both direct and circumstantial evidence cases. *Herndon v. State*, 787 S.W.2d 408, 409 (Tex. Crim. App. 1990). In our review of the legal sufficiency of the evidence, we must consider all the evidence that the jury was permitted, properly or improperly, to consider. *Johnson v. State*, 871 S.W.2d 183, 186 (Tex. Crim. App. 1993), *cert. denied*, 511 U.S. 1046 (1994). Moreover, the sufficiency of the evidence should be measured by the elements of the offense as defined by the "hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997).

Appellant, however, claims the evidence never measured up to the requirement of article 38.14 which provides:

> A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant

> with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

TEX. CODE CRIM. PROC. ANN. art. 38.14 (Vernon 1979).

It is clear from the statute that the testimony of an accomplice witness alone cannot furnish the basis for a conviction and a conviction so based must be reversed. *Paulus v. State*, 633 S.W.2d 827, 843 (Tex. Crim. App. 1981). And this is true no matter how complete a case against the defendant may have been made by the accomplice witness's testimony, and no matter how much credit the jury might have given to such testimony. *Id; Walker v. State*, 615 S.W.2d 728, 731 (Tex. Crim. App. 1981).

An accomplice witness has been described as a discredited witness. *See Munoz v. State*, 853 S.W.2d 558, 559 (Tex. Crim. App. 1993). It has been said that the testimony of an accomplice witness must be viewed with caution and carefully scrutinized not only because of any interest such witness might have, but because his or her testimony is evidence from a corrupt source. *Paulus*, 633 S.W.2d at 843.

The purpose of the accomplice witness rule is to ensure that the jury does not consider accomplice witness evidence unless the jury finds both that the accomplice witness is telling the truth and that other evidence corroborates the accomplice witness. *See Tran v. State*, 870 S.W.2d 654, 658 (Tex. App. – Houston [1st Dist.] 1994, pet. ref'd). The accomplice witness rule is a legislative creation, not required by common law or as a matter of federal constitutional law. *Thompson v. State*, 691 S.W.2d

627, 631 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 865 (1985).

In *Edwards v. State*, 427 S.W.2d 629, 632 (Tex. Crim. App. 1968), the court wrote:

> The test as to the sufficiency of the corroboration is to eliminate from consideration the evidence of the accomplice witness and then to examine the other witnesses with the view to ascertain if there be inculpatory evidence, that is evidence of incriminating character which tends to connect the defendant with the commission of the offense. If there is such evidence, the corroboration is sufficient; otherwise it is not.

See also Burks v. State, 876 S.W.2d 877, 887 (Tex. Crim. App. 1994), *cert. denied*, 513 U.S. 1114 (1995); *Munoz*, 853 S.W.2d at 559; *Reed v. State*, 744 S.W.2d 112, 125 (Tex. Crim. App. 1988); *McDuff v. State*, 943 S.W.2d 517, 521 (Tex. App. – Austin 1997, pet. ref'd).

In applying the test of the sufficiency of the corroboration each case must be considered on its own facts and circumstances, *Reed*, 744 S.W.2d at 126, and all facts may be looked to as furnishing the corroboration. *Washburn v. State*, 318 S.W.2d 627, 634 (Tex. Crim. App. 1958), *cert. denied*, 359 U.S. 965 (1959). The corroborative evidence may be circumstantial or direct. *Gosch v. State*, 829 S.W. 2d 775, 777 (Tex. Crim. App. 1991), *cert. denied*, 509 U.S. 922 (1993); *Paulus*, 633 S.W.2d at 843. Corroborative evidence need not establish the defendant's guilt of the charged offense nor directly link the accused to the offense, but is sufficient if it "tends" to connect the defendant to the offense. *Cox v. State*, 830 S.W.2d 609, 611 (Tex. Crim. App. 1992); *Granger v. State*, 683 S.W.2d 387, 392 (Tex. Crim.

App. 1984), *cert. denied*, 472 U.S. 1012 (1985). Insignificant circumstances sometimes afford most satisfactory evidence of guilt and corroboration of the accomplice witness testimony. *Reed*, 744 S.W.2d at 126.

When, however, the non-accomplice witness' evidence does no more than point the finger of suspicion towards an accused it is insufficient to corroborate as required by article 38.14. *Paulus*, 633 S.W.2d at 844. Although an accomplice witness may state any number of facts that are corroborated by evidence of non-accomplice witnesses, still if the facts thus corroborated do not tend to connect the accused with the crime, corroboration on that basis would not meet the requirements of article 38.14. *Id.* If the non-accomplice witness evidence fails to connect the accused to the offense, the evidence is insufficient to support the conviction. *Munoz*, 853 S.W.2d at 560.

Ybarra, the accomplice witness as a matter of law, made out a complete case against appellant. Without the requirements of article. 36.14, [sic] there would be no question as to the sufficiency of the evidence to support the convictions. Applying the legislatively created accomplice witness rule as we are required to do, and the test of sufficiency of corroboration as discussed in *Edwards*, we must look to the non-accomplice witnesses' testimony. The critical question is whether that evidence tends to connect appellant to the commission of the crimes charged.

The State introduced appellant's extrajudicial statement. Such a statement, if it tends to connect the accused to the commission of the offense, may in a proper case itself corroborate the accomplice witness's testimony. *See*

DeBlanc v. State, 799 S.W.2d 701, 718 (Tex. Crim. App. 1990). Appellant's statement only admitted that he had been with the other three suspects earlier in the evening, and had examined and returned a gun to Garibay. The statement alone does not tend to connect appellant with the offenses. The Morehouses were unable to identify the robber nor was Officer DeLeon able to identify the individual seen running from the Morehouse residence. They gave a vague description as to possible height and body size. Only DeLeon described the individual as a young man. While there was evidence that appellant fit the general description, so would hundreds or thousands of other men in the area. No fingerprints were lifted from the weapon found and no other non-accomplice evidence placed appellant at the scene or in the company of the other three suspects at the time. Of course, a number of the facts stated by Ybarra were corroborated, still these corroborated facts do not tend to connect appellant with the crimes, and corroboration on that basis does not meet the requirements of article 36.14.

Conclusion

We conclude that the accomplice witness's testimony has not been corroborated as required by law. The first point of error is sustained. We, therefore, do not reach the other points of error.

The judgments of conviction are reversed and appellant is ordered acquitted of each. *See Burks v. United*

States, 437 U.S. 1 (1978); *Greene v. Massey*, 437 U.S. 19 (1978).

JOHN F. ONION, JR.
JUSTICE

DO NOT PUBLISH

Court of Appeals
Fourth Court of Appeals District of Texas
San Antonio
* * * (Logo) * * *

JUDGMENT
Appeal No. 04-96-00185-CR

Bruce **FERNANDEZ**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 227th Judicial District Court,
Bexar County, Texas
Trial Court No. 95-CR-0391
Honorable Mike Machado, Judge Presiding

BEFORE CHIEF JUSTICE HARDBERGER, JUSTICE STONE, AND JUSTICE ONION

In accordance with this Court's opinion of this date, the judgments of conviction are REVERSED and appellant is ORDERED ACQUITTED of each.

SIGNED January 21, 1998.

/s/ Phil Hardberger
PHIL HARDBERGER
CHIEF JUSTICE

NO. 04-96-00185-CR

IN THE COURT OF APPEALS

FOR THE FOURTH DISTRICT OF TEXAS

BRUCE FERNANDEZ, Appellant

V

THE STATE OF TEXAS, Appellee

Appeal from BEXAR County

STATE'S MOTION FOR REHEARING

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NO. 04-96-00185-CR

IN THE COURT OF APPEALS

FOR THE FOURTH DISTRICT OF TEXAS

BRUCE FERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

STATE'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF APPEALS:

Comes now the State of Texas, by and through its State Prosecuting Attorney, and respectfully presents to this Court its motion for rehearing in the above named cause, and as ground therefor, would show the Court the following:

STATEMENT OF THE CASE

The appellant, Bruce Fernandez, was charged in two counts of aggravated robbery. A jury found the appellant guilty and his punishment was assessed at 20 years' imprisonment on each count. On original submission, this Court sustained the appellant's first point of error, in which he alleged that the trial court erred in denying his motion for an instructed verdict of not guilty because the State failed to corroborate the testimony of an accomplice witness. Pursuant to the mandate of *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), the Court ordered an acquittal to be entered for each count.

ARGUMENT AND AUTHORITIES

In this case, we do not contest the Court's determination that the evidence is insufficient to corroborate the

accomplice testimony. Nor do we disagree that the judgments of conviction must be reversed. Instead, our disagreement is with the Court's conclusion that insufficiency of the evidence, solely because of a failure to corroborate accomplice testimony, requires entry of an acquittal, thereby creating a double jeopardy bar to reprosecution. Moreover, we recognize that, even if this Court were to agree with our ultimate conclusion regarding the appropriate remedy, the Court may still feel that it is bound to follow contrary precedent from the Court of Criminal Appeals.

I.

Certainly, everyone agrees that when the evidence is deemed legally insufficient to sustain the conviction, a retrial would violate the double jeopardy principles articulated by the United States Supreme Court in *Burks* and *Greene*. However, what has not been expressly articulated is the standard to be employed to determine when the State's evidence is so deficient that a retrial would be barred. Is the standard the minimal due process standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)? Or, is it enough that the State's evidence failed to comply with a *state law* that governs the authority to convict? Or, instead, is the standard at some point in between?

While we are not aware of any definitive holding by the Supreme Court on this issue, we believe that the appropriate standard is the minimal due process requirement of *Jackson v. Virginia*. If that conclusion is correct,

then the State's evidence in this case is not legally insufficient according to federal law, such that double jeopardy implications would be triggered, because a corroboration requirement of accomplice testimony, such as that contained in Vernon's Ann.C.C.P. art. 38.14, is not required by the United States Constitution in order to meet the minimal due process requirements. *See Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917).

II.

In *Jackson v. Virginia*, supra, the Supreme Court held that the evidence would be considered sufficient to meet due process requirements if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. And, in both *Burks* and *Greene*, it is clear that the Supreme Court was considering situations in which the State's evidence failed to comply with that standard. What is not clear from *Burks* and *Greene* is whether the court was limiting its holding to such inadequacies in the prosecution's evidence, or whether that just happened to be the situations presented in those cases. Any answer to that issue would have to wait until another day.

That day came when the Supreme Court decided the case of *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). At the time, a Florida appellate rule authorized an appellate court to review the evidence in a death sentence case to determine if the interests of justice required a new trial, whether the insufficiency of the evidence was a ground of appeal or not. Pursuant to that rule, the Florida Supreme Court had determined in *Tibbs*

that, although the evidence was legally sufficient to meet the requirements of *Jackson v. Virginia*, weaknesses in the prosecution's evidence required a new trial in the interests of justice. The United States Supreme Court ruled that when an appellate court so concludes that a guilty verdict is against the *weight* of the evidence, as opposed to being legally *insufficient*, the Double Jeopardy Clause does not bar the prosecution from a retrial.

Although the Supreme Court again, as in *Burks* and *Greene*, was not explicit regarding the applicable standard of evidentiary insufficiency necessary to invoke a double jeopardy bar to retrial, the implications from the court's language support the conclusion that it is the *Jackson v. Virginia* legal insufficiency standard that is to apply. First of all, the Supreme Court stated in the following language the holding of the Florida Supreme Court that it was to review, and ultimately affirm:

> Having found that it could not "fairly conclude . . . that Tibbs' convictions were reversed on the grounds of evidentiary insufficiency," *id.*, at 1127, the Florida Supreme Court held that *Greene* and *Burks* do not bar retrial. Those decisions, the court believed, as well as *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), interpret the Double Jeopardy Clause to preclude retrial after reversal of a conviction only when the appellate court has set the conviction aside on the ground that the evidence was legally insufficient to support conviction. Other reversals, including those based on the weight of the evidence or made in the "interests of justice," do not implicate double jeopardy principles.

Tibbs v. Florida, 457 U.S. at 39, 102 S.Ct. at 2216, 72 L.Ed.2d at 659.

Also, the Supreme Court described its previous holdings in *Burks* and *Greene* in the following manner:

> *Burks v. United States* and *Greene v. Massey* carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial. In those cases, we held that the Double Jeopardy Clause precludes retrial "once the reviewing court has found the evidence legally insufficient" to support conviction. This standard, we explained, "means that the government's case was so lacking that it should not have even been *submitted* to the jury." *Burks*, 437 U.S., at 16, 98 S.Ct., at 2149 (emphasis in original). A conviction will survive review, we suggested, whenever "the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. In sum, we noted that the rule barring retrial would be "confined to cases where the prosecution's failure is clear." *Burks, supra*, at 17, 98 S.Ct., at 2150.

Tibbs v. Florida, 457 U.S. at 40-41, 102 S.Ct. at 2217, 72 L.Ed.2d at 660-61. (Citations omitted).

Moreover, the Supreme Court in *Tibbs* made specific reference to the Due Process Clause's standard of evidentiary sufficiency decided in *Jackson v. Virginia*. This reference was made in response to the petitioner's contention that a distinction between the weight and the sufficiency of the evidence would undermine the *Burks* rule by encouraging appellate judges to base reversals on the

weight, rather than the sufficiency, of the evidence. The context in which this reference was made is also an indication that the Supreme Court was making a distinction, for purposes of double jeopardy, between cases determined to be deficient due to evidentiary weight or due to legal insufficiency, and that it considered the *Jackson v. Virginia* threshold as the mark for any triggering of double jeopardy limitations on reprosecution. *Tibbs v. Florida*, 457 U.S. at 44-45, 102 S.Ct. at 2219-20, 72 L.Ed.2d at 663.

This distinction drawn by the Supreme Court is further evidenced by the court's explanation of the difference between reversals of convictions due to evidentiary insufficiency and reversals because a guilty verdict is against the weight of the evidence. The court explained:

> As we suggested just last Term, these policies do not have the same force when a judge disagrees with a jury's resolution of conflicting evidence and concludes that a guilty verdict is against the weight of the evidence. See *Hudson v. Louisiana*, 450 U.S. 40, 44-45, n. 5, 101 S.Ct. 970, 972-973, n. 5, 67 L.Ed.2d 30 (1981). A reversal on this ground, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. This difference of opinion no more signifies acquittal than does a disagreement among the jurors themselves. A deadlocked jury, we consistently have recognized, does not result in an acquittal barring retrial under the Double Jeopardy Clause. Similarly, an appellate court's disagreement with the jurors'

> weighing of the evidence does not require the special deference accorded verdicts of acquittal.

Id., 457 U.S. at 42, 102 S.Ct. at 2218, 72 L.Ed.2d at 661-62. Clearly, the Supreme Court did not view an appellate finding that the verdict was against the weight of the evidence as possessing those same distinguishing properties as would a verdict of acquittal.

Finally, any ambiguity regarding the appropriate standard of evidentiary insufficiency that might persist from the majority opinion in *Tibbs* is allayed by Justice White's dissenting opinion in the case. Justice White believed the "trump card" in this analysis to be the court's assertion in *Burks* that the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. According to Justice White, since either situation, whether it involved evidence deemed legally insufficient under the federal due process standard or evidence determined to be inadequate on state law grounds, involved the failure of the State to present evidence adequate to sustain the conviction, the double jeopardy implications of each situation should be the same. Obviously, the majority of the court rejected this interpretation. However, more important to the issue in this case is Justice White's assertion of what the court's majority was holding. To illustrate this point, we quote at length from portions of the dissenting opinion:

> The majority concedes, as it must under *Burks, supra,* that if the State's evidence failed to meet the federal due process standard of evidentiary sufficiency, the Double Jeopardy

> Clause would bar reprosecution. The majority fails to explain why the State should be allowed another try where its proof has been held inadequate on state-law grounds, when it could not do so were it inadequate on federal law grounds.
>
> * * *
>
> The majority offers two arguments in its attempt to distinguish the two cases. First, it emphasizes that the Double Jeopardy Clause "attaches special weight to judgments of acquittal." . . . Second, the majority thinks it to be of some significance that when the evidence is determined to be insufficient as a matter of federal law, then no rational factfinder could have voted to convict on that basis. On the other hand, when the conviction is reversed on the basis of the state-law rule applying a "weight of the evidence" test, that "does not mean that acquittal was the only proper verdict." *Ante,* at 2218. The constraints of the Double Jeopardy Clause, however, do not depend upon a determination that an "acquittal was the only proper verdict." The fact remains that the State failed to prove the defendant guilty in accordance with the evidentiary requirements of state law.
>
> * * *
>
> . . . That the proof fails on state-law, rather than federal-law grounds is immaterial to these policy considerations.

Tibbs v. Florida, 457 U.S. at 48-50, 102 S.Ct. at 2222-23, 72 L.Ed.2d at 665-67 (White, J., dissenting).

Justice White certainly understood the majority of the Supreme Court in *Tibbs* to be making the relevant distinction between cases determined to be inadequate on federal-law grounds, i.e., legal insufficiency of the evidence, and those held inadequate on state-law grounds.

III.

Additional support for the proposition that double jeopardy implications arising from an insufficiency of the evidence are to be governed by the federal due process standard of *Jackson v. Virginia* can be found in the language utilized by the Supreme Court in *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), which was handed down the same day as were *Burks* and *Greene*. In *Scott*, the Supreme Court was interpreting a federal statute which prohibited appeals by the government of the dismissal of an indictment if the Double Jeopardy Clause prohibited further prosecution. There, the Supreme Court said:

> . . . Despite respondent's contentions, an appeal is not barred[1] simply because a ruling in favor of a defendant "is based upon facts outside the face of the indictment," *id.*, at 348, 95 S.Ct., at 1024, or because it "is granted on the ground . . . that the defendant simply cannot be convicted of the offense charged," *Lee*, 432 U.S., at 30, 97 S.Ct., at 2146. Rather, a defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correctly or not,

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[1] In other words, there is no double jeopardy bar to reprosecution.

> of some or all of the factual elements of the offense charged," *Martin Linen, supra,* 430 U.S., at 571, 97 S.Ct., at 1355. Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed.Rule Crim.Proc. 29, appeal will be barred only when "it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." 430 U.S., at 572, 97 S.Ct., at 1355.

Id., 437 U.S. at 96-97, 98 S.Ct. at 2197, 57 L.Ed.2d at 78.

And, in footnote 11 of *Scott,* the court made the following observation: "While an acquittal on the merits by the trier of fact 'can never represent a determination that the criminal defendant is innocent in any absolute sense,' *post,* at 2202 (BRENNAN, J., dissenting), a defendant who has been released by a court for reasons required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word, absolute or otherwise. In other circumstances, this Court has had no difficulty in distinguishing between those rulings which relate to "the ultimate question of guilt or innocence" and those which serve other purposes." *Id.*, 437 U.S. at 98, n. 11, 98 S.Ct. at 2197-98, n. 11, 57 L. Ed. 2d at 79, n. 11.

The above-cited language from *United States v. Scott* represents a further indication that the United States Supreme Court believes that to invoke a double jeopardy bar to reprosecution, the prosecution's evidence must fail to meet the requirements for legal sufficiency, and not

just fail for reasons unrelated to a determination of insufficiency of proof of the factual elements of the offense.

IV.

The Court of Criminal Appeals recently retreated from its utilization of the *"Benson-Boozer"* doctrine as a supposed implementation of federal double jeopardy principles. In *Malik v. State*, 953 S.W.2d 234 (Tex.Cr.App. 1997), the court finally recognized that the *"Benson-Boozer"* line of cases constituted an aberrational application of federal double jeopardy jurisprudence to a unique state-law construct for determining evidentiary sufficiency. In *Malik*, the Court of Criminal Appeals held that, instead of measuring the sufficiency of the evidence against the jury charge actually given, sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. Such a charge would be one that accurately sets out the law, is authorized by the indictment, does not necessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.

To the extent that the *Malik* decision constituted an attempt by the Court of Criminal Appeals to bring its application of federal principles of double jeopardy more in line with that applied by the federal system, the decision is a significant improvement. However, by looking to a hypothetically correct charge to gauge the sufficiency of the evidence, the Court of Criminal Appeals failed to go far enough to properly implement these federal constitutional principles. For example, in this case, in which

corroboration of accomplice testimony does not fulfill any requirement of federal due process, it being instead a state-created rule governing the *weight of the evidence* sufficient to convict, such corroboration requirement would nevertheless have to be considered part of a hypothetically correct jury charge for the case.[2]

V.

Yet, an acquittal of a conviction determined to be supported by insufficient evidence, due solely to the failure to sufficiently corroborate accomplice testimony, is not a proper application of the federal double jeopardy principles first pronounced in *Burks* and *Greene*. Instead of the evidence in this case failing to meet the minimal due process requirements of *Jackson v. Virginia*, it is more akin to the evidence determined to be lacking in sufficient *weight* in *Tibbs v. Florida*. In order to meet the requirements of *Jackson v. Virginia*, it would only be necessary that any rational juror find the elements of the offense to have been proven beyond a reasonable doubt, without regard to any corroboration of an accomplice witness. However, Vernon's Ann.C.C.P. art. 38.14 constitutes an additional state-created standard that governs the *weight* of the evidence sufficient to convict.

It is also significant that Art. 38.14 does not speak in terms of an "acquittal." Instead, it reads "[a] conviction cannot be had. . . . " Therefore, the reversal on appeal

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[2] Therefore, we understand how this Court may believe itself bound to acquit the appellant because of the decision by the Court of Criminal Appeals in *Malik*.

cannot be considered as an implied acquittal of the offense. Thus, the situation in this case would not be determined by the principle referred to by the Supreme Court in *Burks* that an acquittal, no matter how erroneous, would be afforded absolute finality. As such, the appellate court's determination of evidentiary insufficiency in this case would be the same as an appellate court's determination of factual insufficiency, pursuant to *Clewis v. State*, 922 S.W.2d 126 (Tex.Cr.App. 1996).[3] In neither case does the reviewing court's determination that the evidence is insufficient to support the jury's verdict constitute a double jeopardy bar to reprosecution.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court grant this motion for rehearing and remand the cause for a new trial.

Respectfully submitted,

MATTHEW PAUL
State Prosecuting Attorney
Bar I.D. No. 15641050

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[3] In *Clewis*, the Court of Criminal Appeals described the double jeopardy consequences of an appellate reversal due to evidentiary insufficiency in the following manner: "[R]etrial is prohibited where the reviewing court determines that the evidence is insufficient under *Jackson*. That is, as a practical matter, the State has only one opportunity to present evidence *legally* sufficient to convict a defendant." *Id.*, at 136. (Emphasis in original).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 30th day of January, 1998, a true and correct copy of the foregoing State's Motion for Rehearing has been forwarded by U.S. Mail, postage prepaid to the following:

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Assistant Criminal District Attorney
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COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-3037
HERB SCHAEFER, CLERK

February 18, 1998

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RE: Court of Appeals Number: 04-96-00185-CR

Trial Court Case Number: 95-CR-0391

Style: Bruce Fernandez
v.
The State of Texas

Dear Counsel:

After examining the record in the above styled and numbered cause, the Court DENIES State's Motion for Rehearing.

ORDERED the day and year above written.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Apryl Stirling

Apryl Stirling, Deputy Clerk

NO. 04-96-00185-CR

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

BRUCE FERNANDEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

Appeal from BEXAR County

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

MATTHEW PAUL
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NO. 04-96-00185-CR

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

BRUCE FERNANDEZ, Appellant

V.

THE STATE OF TEXAS Appellee

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Comes now the State of Texas, by and through its State Prosecuting Attorney, and respectfully urges this Court to grant discretionary review of the above named cause, pursuant to the rules of the Court.

STATEMENT REGARDING ORAL ARGUMENT

The State Prosecuting Attorney does request oral argument.

STATEMENT OF THE CASE

The appellant, Bruce Fernandez, was charged in two counts of aggravated robbery. A jury found the appellant

guilty and his punishment was assessed at 20 years' imprisonment on each count. On original submission, this Court sustained the appellant's first point of error, in which he alleged that the trial court erred in denying his motion for an instructed verdict of not guilty because the State failed to corroborate the testimony of an accomplice witness. Pursuant to the mandate of *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978), the Court ordered an acquittal to be entered for each count.

STATEMENT OF PROCEDURAL HISTORY

The appellant was convicted of two counts of aggravated robbery. On direct appeal, the San Antonio Court of Appeals concluded that the evidence was insufficient to sustain the convictions because the State had failed to sufficiently corroborate accomplice testimony. The Court of Appeals reversed the judgments of conviction and ordered entry of an acquittal as to each count.

The State filed a motion for rehearing, in which it contended that the proper remedy would have been for the Court of Appeals to remand the causes for new trials, instead of ordering the entry of acquittals. On February 18, 1998, the Court of Appeals overruled the State's motion for rehearing.

Thus, the State's petition for discretionary review is due to be filed on or before March 20, 1998.

GROUND FOR REVIEW

Where a conviction is reversed on appeal because of insufficient evidence, due solely to the failure to sufficiently corroborate accomplice testimony, is the proper remedy the entry of an acquittal or, instead, a remand for a new trial?

REASON FOR REVIEW

The Court of Appeals has decided an important question of federal law in a way that conflicts with an applicable decision of the Supreme Court of the United States, namely, *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982).

ARGUMENT AND AUTHORITIES

In this case, we do not contest the Court of Appeals's determination that the evidence is insufficient to corroborate the accomplice testimony. Nor do we disagree that the judgments of conviction must be reversed. Instead, our disagreement is with the intermediate court's conclusion that insufficiency of the evidence, solely because of a failure to corroborate accomplice testimony, requires entry of an acquittal, thereby creating a double jeopardy bar to reprosecution.

I.

Certainly, everyone agrees that when the evidence is deemed legally insufficient to sustain the conviction, a retrial would violate the double jeopardy principles articulated by the United States Supreme Court in *Burks* and

Greene. However, what has not been expressly articulated is the standard to be employed to determine when the State's evidence is so deficient that a retrial would be barred. Is the standard the minimal due process standard of *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)? Or, is it enough that the State's evidence failed to comply with a *state law* that governs the authority to convict? Or, instead, is the standard at some point in between?

While we are not aware of any definitive holding by the Supreme Court on this issue, we believe that the appropriate standard is the minimal due process requirement of *Jackson v. Virginia*. If that conclusion is correct, then the State's evidence in this case is not legally insufficient according to federal law, such that double jeopardy implications would be triggered, because a corroboration requirement of accomplice testimony, such as that contained in Vernon's Ann.C.C.P. art. 38.14, is not required by the United States Constitution in order to meet the minimal due process requirements. *See Caminetti v. United States*, 242 U.S. 470, 37 S.Ct. 192, 61 L.Ed. 442 (1917).

II.

In *Jackson v. Virginia*, supra, the Supreme Court held that the evidence would be considered sufficient to meet due process requirements if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. And, in both *Burks* and *Greene*, it is clear that the Supreme Court was considering situations in which the State's evidence failed to comply with that standard. What is not clear from *Burks* and

Greene is whether the court was limiting its holding to such inadequacies in the prosecution's evidence, or whether that just happened to be the situations presented in those cases. Any answer to that issue would have to wait until another day.

That day came when the Supreme Court decided the case of *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). At the time, a Florida appellate rule authorized an appellate court to review the evidence in a death sentence case to determine if the interests of justice required a new trial, whether the insufficiency of the evidence was a ground of appeal or not. Pursuant to that rule, the Florida Supreme Court had determined in *Tibbs* that, although the evidence was legally sufficient to meet the requirements of *Jackson v. Virginia*, weaknesses in the prosecution's evidence required a new trial in the interests of justice. The United States Supreme Court ruled that when an appellate court so concludes that a guilty verdict is against the *weight* of the evidence, as opposed to being legally *insufficient*, the Double Jeopardy Clause does not bar the prosecution from a retrial.

Although the Supreme Court again, as in *Burks* and *Greene*, was not explicit regarding the applicable standard of evidentiary insufficiency necessary to invoke a double jeopardy bar to retrial, the implications from the court's language support the conclusion that it is the *Jackson v. Virginia* legal insufficiency standard that is to apply. First of all, the Supreme Court stated in the following language the holding of the Florida Supreme Court that it was to review, and ultimately affirm:

> Having found that it could not "fairly conclude . . . that Tibbs' convictions were reversed on the grounds of evidentiary insufficiency," *id.*, at 1127, the Florida Supreme Court held that *Greene* and *Burks* do not bar retrial. Those decisions, the court believed, as well as *United States v. DiFrancesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980), interpret the Double Jeopardy Clause to preclude retrial after reversal of a conviction only when the appellate court has set the conviction aside on the ground that the evidence was legally insufficient to support conviction. Other reversals, including those based on the weight of the evidence or made in the "interests of justice," do not implicate double jeopardy principles.

Tibbs v. Florida, 457 U.S. at 39, 102 S.Ct. at 2216, 72 L.Ed.2d at 659.

Also, the Supreme Court described its previous holdings in *Burks* and *Greene* in the following manner:

> *Burks v. United States* and *Greene v. Massey* carved a narrow exception from the understanding that a defendant who successfully appeals a conviction is subject to retrial. In those cases, we held that the Double Jeopardy Clause precludes retrial "once the reviewing court has found the evidence legally insufficient" to support conviction. This standard, we explained, "means that the government's case was so lacking that it should not have even been *submitted* to the jury." Burks, 437 U.S., at 16, 98 S.Ct., at 2149 (emphasis in original). A conviction will survive review, we suggested, whenever "the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding

> the defendant guilty beyond a reasonable doubt. In sum, we noted that the rule barring retrial would be "confined to cases where the prosecution's failure is clear." *Burks, supra,* at 17, 98 S.Ct., at 2150.

Tibbs v. Florida, 457 U.S. at 40-41, 102 S.Ct. at 2217, 72 L.Ed.2d at 660-61. (Citations omitted).

Moreover, the Supreme Court in *Tibbs* made specific reference to the Due Process Clause's standard of evidentiary sufficiency decided in *Jackson v. Virginia.* This reference was made in response to the petitioner's contention that a distinction between the weight and the sufficiency of the evidence would undermine the *Burks* rule by encouraging appellate judges to base reversals on the weight, rather than the sufficiency, of the evidence. The context in which this reference was made is also an indication that the Supreme Court was making a distinction, for purposes of double jeopardy, between cases determined to be deficient due to evidentiary weight or due to legal insufficiency, and that it considered the *Jackson v. Virginia* threshold as the mark for any triggering of double jeopardy limitations on reprosecution. *Tibbs v. Florida,* 457 U.S. at 44-45, 102 S.Ct. at 2219-20, 72 L.Ed.2d at 663.

This distinction drawn by the Supreme Court is further evidenced by the court's explanation of the difference between reversals of convictions due to evidentiary insufficiency and reversals because a guilty verdict is against the weight of the evidence. The court explained:

> As we suggested just last Term, these policies do not have the same force when a judge disagrees with a jury's resolution of conflicting

> evidence and concludes that a guilty verdict is against the weight of the evidence. See *Hudson v. Louisiana*, 450 U.S. 40, 44-45, n. 5, 101 S.Ct. 970, 972-973, n. 5, 67 L.Ed.2d 30 (1981). A reversal on this ground, unlike a reversal based on insufficient evidence, does not mean that acquittal was the only proper verdict. Instead, the appellate court sits as a "thirteenth juror" and disagrees with the jury's resolution of the conflicting testimony. This difference of opinion no more signifies acquittal than does a disagreement among the jurors themselves. A deadlocked jury, we consistently have recognized, does not result in an acquittal barring retrial under the Double Jeopardy Clause. Similarly, an appellate court's disagreement with the jurors' weighing of the evidence does not require the special deference accorded verdicts of acquittal.

Id., 457 U.S. at 42, 102 S.Ct. at 2218, 72 L.Ed.2d at 661-62. Clearly, the Supreme Court did not view an appellate finding that the verdict was against the weight of the evidence as possessing those same distinguishing properties as would a verdict of acquittal.

Finally, any ambiguity regarding the appropriate standard of evidentiary insufficiency that might persist from the majority opinion in *Tibbs* is allayed by Justice White's dissenting opinion in the case. Justice White believed the "trump card" in this analysis to be the court's assertion in *Burks* that the Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. According to Justice White, since either situation, whether it involved evidence deemed legally insufficient under the

federal due process standard or evidence determined to be inadequate on state law grounds, involved the failure of the State to present evidence adequate to sustain the conviction, the double jeopardy implications of each situation should be the same. Obviously, the majority of the court rejected this interpretation. However, more important to the issue in this case is Justice White's assertion of what the court's majority was holding. To illustrate this point, we quote at length from portions of the dissenting opinion:

> The majority concedes, as it must under *Burks, supra,* that if the State's evidence failed to meet the federal due process standard of evidentiary sufficiency, the Double Jeopardy Clause would bar reprosecution. The majority fails to explain why the State should be allowed another try where its proof has been held inadequate on state-law grounds, when it could not do so were it inadequate on federal-law grounds.
>
> * * * * *
>
> The majority offers two arguments in its attempt to distinguish the two cases. First, it emphasizes that the Double Jeopardy Clause "attaches special weight to judgments of acquittal." . . . Second, the majority thinks it to be of some significance that when the evidence is determined to be insufficient as a matter of federal law, then no rational factfinder could have voted to convict on that basis. On the other hand, when the conviction is reversed on the basis of the state-law rule applying a "weight of the evidence" test, that "does not mean that acquittal was the only proper verdict." Ante, at 2218. The constraints of the Double Jeopardy

> Clause, however, do not depend upon a determination that an "acquittal was the only proper verdict." The fact remains that the State failed to prove the defendant guilty in accordance with the evidentiary requirements of state law.
>
> * * * * *
>
> . . . That the proof fails on state-law, rather than federal-law grounds is immaterial to these policy considerations.

Tibbs v. Florida, 457 U.S. at 48-50, 102 S.Ct. at 2222-23, 72 L.Ed.2d at 665-67 (White, J., dissenting).

Justice White certainly understood the majority of the Supreme Court in *Tibbs* to be making the relevant distinction between cases determined to be inadequate on federal-law grounds, i.e., legal insufficiency of the evidence, and those held inadequate on state-law grounds.

III.

Additional support for the proposition that double jeopardy implications arising from an insufficiency of the evidence are to be governed by the federal due process standard of *Jackson v. Virginia* can be found in the language utilized by the Supreme Court in *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), which was handed down the same day as were *Burks* and *Greene*. In *Scott*, the Supreme Court was interpreting a federal statute which prohibited appeals by the government of the dismissal of an indictment if the Double Jeopardy Clause prohibited further prosecution. There, the Supreme Court said:

> . . . Despite respondent's contentions, an appeal is not barred[1] simply because a ruling in favor of a defendant "is based upon facts outside the face of the indictment," *id.*, at 348, 95 S.Ct., at 1024, or because it "is granted on the ground . . . that the defendant simply cannot be convicted of the offense charged," *Lee*, 432 U.S., at 30, 97 S.Ct., at 2146. Rather, a defendant is acquitted only when "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correctly or not, of some or all of the factual elements of the offense charged," *Martin Linen, supra*, 430 U.S., at 571, 97 S.Ct., at 1355. Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed.Rule Crim.Proc. 29, appeal will be barred only when "it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction." 430 U.S., at 572, 97 S. Ct., at 1355.

United States v. Scott, 437 U.S. at 96-97, 98 S.Ct. at 2197, 57 L.Ed.2d at 78.

And, in footnote 11 of *Scott*, the court made the following observation: "While an acquittal on the merits by the trier of fact 'can never represent a determination that the criminal defendant is innocent in any absolute sense,' *post*, at 2202 (BRENNAN, J., dissenting), a defendant who has been released by a court for reasons

---

[1] In other words, there is no double jeopardy bar to reprosecution.

required by the Constitution or laws, but which are unrelated to factual guilt or innocence, has not been determined to be innocent in any sense of that word, absolute or otherwise. In other circumstances, this Court has had no difficulty in distinguishing between those rulings which relate to "the ultimate question of guilt or innocence" and those which serve other purposes." *Id.*, 437 U.S. at 98, n. 11, 98 S.Ct. at 2197-98, n. 11, 57 L.Ed.2d at 79, n. 11.

The above-cited language from *United States v. Scott* represents a further indication that the United States Supreme Court believes that to invoke a double jeopardy bar to reprosecution, the prosecution's evidence must fail to meet the requirements for legal sufficiency, and not just fail for reasons unrelated to a determination of insufficiency of proof of the factual elements of the offense.

IV.

This Court recently retreated from its utilization of the *"Benson-Boozer"* doctrine as a supposed implementation of federal double jeopardy principles. In *Malik v. State*, 953 S.W.2d 234 (Tex.Cr.App. 1997), the Court finally recognized that the *"Benson-Boozer"* line of cases constituted an aberrational application of federal double jeopardy jurisprudence to a unique state-law construct for determining evidentiary sufficiency. In *Malik*, the Court held that, instead of measuring the sufficiency of the evidence against the jury charge actually given, sufficiency of the evidence should be measured by the elements of the offense as defined by the hypothetically correct jury charge for the case. Such a charge would be one that

accurately sets out the law, is authorized by the indictment, does not necessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried.

To the extent that the *Malik* decision constituted an attempt by the Court to bring its application of federal principles of double jeopardy more in line with that applied by the federal system, the decision is a significant improvement. However, by looking to a hypothetically correct charge to gauge the sufficiency of the evidence, the Court failed to go far enough to properly implement these federal constitutional principles. For example, in this case, in which corroboration of accomplice testimony does not fulfill any requirement of federal due process, it being instead a state-created rule governing the *weight of the evidence* sufficient to convict, such corroboration requirement would nevertheless have to be considered part of a hypothetically correct jury charge for the case.

V.

Yet, an acquittal of a conviction determined to be supported by insufficient evidence, due solely to the failure to sufficiently corroborate accomplice testimony, is not a proper application of the federal double jeopardy principles first pronounced in *Burks* and *Greene*. Instead of the evidence in this case failing to meet the minimal due process requirements of *Jackson v. Virginia*, it is more akin to the evidence determined to be lacking in sufficient *weight* in *Tibbs v. Florida*. In order to meet the requirements of *Jackson v. Virginia*, it would only be necessary that any rational juror find the elements of the

offense to have been proven beyond a reasonable doubt, without regard to any corroboration of an accomplice witness. However, Vernon's Ann.C.C.P. art. 38.14 constitutes an additional state-created standard that governs the *weight* of the evidence sufficient to convict.

It is also significant that Art. 38.14 does not speak in terms of an "acquittal." Instead, it reads "[a] conviction cannot be had. . . . " Therefore, the reversal on appeal cannot be considered as an implied acquittal of the offense. Thus, the situation in this case would not be determined by the principle referred to by the Supreme Court in *Burks* that an acquittal, no matter how erroneous, would be afforded absolute finality. As such, the appellate court's determination of evidentiary insufficiency in this case would be the same as an appellate court's determination of factual insufficiency, pursuant to *Clewis v. State*, 922 S.W.2d 126 (Tex.Cr.App. 1996).[2] In neither case does the reviewing court's determination that the evidence is insufficient to support the jury's verdict constitute a double jeopardy bar to reprosecution.

---

[2] In *Clewis*, the Court of Criminal Appeals described the double jeopardy consequences of an appellate reversal due to evidentiary insufficiency in the following manner: "[Rletrial is prohibited where the reviewing court determines that the evidence is insufficient under *Jackson*. That is, as a practical matter, the State has only one opportunity to present evidence *legally* sufficient to convict a defendant." *Id.*, at 136. (Emphasis in original).

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals grant this Petition for Discretionary Review, that the case be set for submission, and that after submission, this Court reverse the decision of the Court of Appeals.

Respectfully submitted,

MATTHEW PAUL
State Prosecuting Attorney
Bar I.D. No. 15641050

/s/ Jeffery L. Van Horn
JEFFREY L. VAN HORN
First Assistant State's Attorney
Bar I.D. No. 20446700

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of February, 1998, the following have been completed:

(1) The original and one legible copy of the above and foregoing petition and supporting brief have been mailed, postage prepaid, to the Clerk of the Fourth Court of Appeals at San Antonio for filing and handling in that Court pursuant to Tex.R.App.P. 68.3 of the Texas Rules of Appellate Procedure.

(2) Eleven legible copies of said petition have been filed with the Clerk of the Court of Criminal Appeals in accordance with Tex.R.App.P. 68.3 as adopted by the Court of Criminal Appeals.

(3) A legible copy of said petition has been mailed by U.S. Mail to:

Honorable Ed Shaughnessy
Assistant Criminal District Attorney
300 Dolorosa, Suite 5072
San Antonio, Texas 78205-3005

Honorable Suzanne M. Kramer
Attorney at Law
127 Lewis Street
San Antonio, Texas 78212

/s/ Jeffrey L. Van Horn
JEFFREY L. VAN HORN
First Assistant State's Attorney
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COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-3037
HERB SCHAEFER, CLERK

June 9, 1998

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San Antonio, TX 78205-3030

RE: Court of Appeals Number: 04-96-00185-CR
Trial Court Case Number: 95-CR-0391

Style: Bruce Fernandez
v.
The State of Texas

Dear Counsel:

The Appellant's Motion for Request of Publication of Opinion in the above styled and numbered cause has this date been GRANTED.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Apryl Stirling
Apryl Stirling, Deputy Clerk

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION,
AUSTIN, TEXAS 78711

OFFICIAL BUSINESS
STATE OF TEXAS
STATE PENALTY
FOR PRIVATE USE
ADDRESS SERVICE REQUESTED

On this day, the State's Petition for Discretionary Review filed by the State Prosecuting Attorney has been refused.

Troy C. Bennett, Jr.,

STEVEN C. HILBIG
BEXAR COUNTY CRIM
DIST ATTY
300 DOLOROSA SUITE 4025
SAN ANTONIO TX 78205-3030

FILE COPY

NO. 04-96-00185-CR

BRUCE FERNANDEZ, Appellant	IN THE COURT OF APPEALS
VS.	FOURTH COURT OF APPEALS DISTRICT
THE STATE OF TEXAS, Appellee	SAN ANTONIO, TEXAS

MOTION TO STAY MANDATE

(Filed Aug. 5, 1998)

To The Honorable Court of Appeals:

Now Comes, Steven C. Hilbig, Criminal District Attorney for Bexar County, Texas and files, pursuant to Rule 18.2, Tex. R. App. Proc., this motion to stay the issuance of the mandate in the instant case. In support of said motion the State would show the Court the following:

A.

The appellant was charged, by way of indictment, with two counts of Aggravated Robbery in cause Number 95-CR-0391. Punishment was assessed at twenty (20) years on each count, to be served concurrently.

B.

An appeal was pursued by the appellant. On January 21, 1998 this Court, in a published opinion authored by Justice John F. Onion, Jr. (sitting by assignment) reversed

the convictions and remanded the cause with instructions to order a judgment of acquittal. *See: Fernandez v. State*, (No. 04-96-00185-CR, Tex. App. – San Antonio, January 21, 1998). The State's Motion for Rehearing was denied on February 18, 1998.

C.

On February 20, 1998, a Petition for Discretionary Review was filed in this Court by the office of the State Prosecuting Attorney.

D.

On March 11, 1998, that petition was received and filed in the Court of Criminal Appeals.

E.

On July 8, 1998, the Court of Criminal Appeals refused the State's Petition for Discretionary Review.

F.

Rule 18.2, *supra* provides the following support for the granting of this motion.

> A party may move to stay issuance of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari. The Motion must state the grounds for the petition and the circumstances requiring the stay. The appellate court authorized to issue the mandate may grant a stay if it finds that the grounds are substantial and that the petitioner

> or others would incur serious hardship from the mandate's issuance if the United States Supreme Court were late to reverse the judgment. In a criminal case, the stay will last for no more than 90 days, to permit the timely filing of a petition for writ of certiorari. After that period and others mentioned in this rule expire, the mandate will issue.

G.

The appellee, The State of Texas, is in the process of compiling a petition for writ of certiorari to be filed in the United States Supreme Court. The grounds to be alleged in that petition are as follows:

> Whether Texas courts have misconstrued the decisions *Burks v. United States*, 437 U.S.1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978); and *Tibbs v. Florida*, 457 U.S.31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982) by ordering an acquittal when the conviction is reversed on appeal solely due to the failure to corroborate accomplice testimony, a clear state-law requirement that does not constitute an element of the offense.

H.

The State's petition for writ of certiorari is due to be filed on or before October 6, 1998. *See*: 13.1, Sup. Ct. R. The petition had been drafted but needs to be processed by a printer's office, outside of the District Attorney's office, in order to comply with the rules of the Supreme Court.

I.

If this court does not stay the mandate, the appellant will be pre-maturely released from the Institutional Division of the Texas Department of Criminal Justice.

Prayer

Wherefore, premises, considered the State would urge this Honorable Court to stay the issuance of its mandate in the instant case until such time as the State's petition for writ of certiorari is ruled upon by the Supreme Court of the United States.

Respectfully submitted,

/s/ Edward F. Shaughnessy, III
EDWARD F.
SHAUGHNESSY, III
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State Bar No. 18134500
(On Appeal)

Attorney for the State

CERTIFICATE OF SERVICE

I, EDWARD F. SHAUGHNESSY, III, Assistant Criminal District Attorney, Bexar County, Texas, hereby certify that a true copy of the above and foregoing Motion to Stay Mandate, was mailed to Ms. Suzanne Kramer, Attorney for Appellant, 126 Lewis St., San Antonio, Texas, 78212 on this 5th day of August, 1998.

/s/ Edward F. Shaughnessy, III
EDWARD F.
SHAUGHNESSY, III

CERTIFICATE OF SERVICE

I, EDWARD F. SHAUGHNESSY, III, Assistant Criminal District Attorney, Bexar County, Texas, hereby certify that a true copy of the above and foregoing Motion to Stay Mandate, was mailed to Mr. John Fahle, Attorney for Appellant, 930 S. Alamo St. No. 3, San Antonio, Texas, 78205 on this 5th day of August, 1998

/s/ Edward F. Shaughnessy, III
EDWARD F.
SHAUGHNESSY, III

CERTIFICATE OF SERVICE

I, EDWARD F. SHAUGHNESSY, III, Assistant Criminal District Attorney, Bexar County, Texas, hereby certify that a true copy of the above and foregoing Motion to Stay Mandate, was mailed to Mr. Jeffrey Van Horn, First

Assistant State's Attorney, P.O. Box 12405, Austin, Texas, 78711 on this 5th day of August, 1998.

/s/ Edward F. Shaughnessy, III
EDWARD F.
SHAUGHNESSY, III

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-30307
HERB SCHAEFER, CLERK

August 5, 1998

Suzanne M. Kramer
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San Antonio, TX 78212

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LAW OFFICE OF
JOHN J. FAHLE
930 South Alamo Street, Suite 3
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Jeffrey L. Van Horn
First Assistant State's Attorney
P.O. Box 12405
Austin, TX 78711

RE: Court of Appeals Number: 04-96-00185-CR

Trial Court Case Number: 95-CR-0391

Style: Bruce Fernandez
v.
The State of Texas

Dear Counsel:

The State's Motion to Stay Mandate in the above styled and numbered cause has this date been received and filed.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Susan Baird
SUSAN BAIRD, DEPUTY CLERK

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-30307
HERB SCHAEFER, CLERK

August 19, 1998

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RE: Court of Appeals Number: 04-96-00185-CR

Trial Court Case Number: 95-CR-0391

Style: Bruce Fernandez
v.
The State of Texas

Dear Counsel:

The State's Motion to Stay Mandate in the above styled and numbered cause has this date been DENIED.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Apryl Stirling
Apryl Stirling, Deputy Clerk

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205-30307
HERB SCHAEFER, CLERK

September 1, 1998

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Jeffrey L. Van Horn
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Austin, TX 78711

RE: Court of Appeals Number: 04-96-00185-CR

Trial Court Case Number: 95-CR-0391

Style: Bruce Fernandez
v.
The State of Texas

Dear Counsel:

The Court has this date issued the Mandate in the above styled and numbered cause.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ Cynthia A. Martinez

Cynthia A. Martinez, Deputy

Texas Code of Criminal Procedure,
Art. 38. 14. Testimony of accomplice

A conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense.

Texas Penal Code,
§ 29.03. Aggravated Robbery

(a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:

(1) causes serious bodily injury to another;

(2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(A) 65 years of age or older; or

(B) a disabled person.

(b) An offense under this section is a felony of the first degree.

(c) In this section, "disabled person" means an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.

Texas Penal Code,
§ 29.02. Robbery

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:

(1) intentionally, knowingly, or recklessly causes bodily injury to another; or

(2) intentionally or knowingly threatens or places another in fear or imminent bodily injury or death.

(b) An offense under this section is a felony of the second degree.

Texas Penal Code,
§ 2.01. Proof Beyond a Reasonable Doubt

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial.

COMPILATION OF RELATED DECISIONS

Federal Cases

Government of Virgin Islands v. Civil, 591 F.2d 255 (3rd Cir. 1979)
DuBois v. Lockhart, 859 F.2d 1314 (8th Cir. 1988)

Alabama

Peacock v. State, 369 So.2d 61 (Ala.Cr.App. 1979)
McCoy v. State, 397 So.2d 577 (Ala.Cr.App. 1981)
Mills v. State, 408 So.2d 187 (Ala.Cr.App. 1981)
Caldwell v. State, 418 So.2d 168 (Ala.Cr.App. 1981)
Massey v. State, 497 So.2d 590 (Ala.Cr.App. 1986)
Garth v. State, 580 So.2d 118 (Ala.Cr.App. 1991)

Arkansas

Pollard v. State, 264 Ark. 753, 574 S.W.2d 656 (Ark. 1978)
Roleson v. State, 272 Ark. 346, 614 S.W.2d 656 (Ark. 1981)
Strickland v. State, 16 Ark.App. 293, 701 S.W.2d 127 (Ark.App. 1985)
Foster v. State, 290 Ark. 495, 722 S.W.2d 869 (Ark. 1987)
Williams v. State, 328 Ark. 487, 944 S.W.2d 822 (Ark. 1997)

Idaho

State v. Byers, 102 Idaho 159, 627 P.2d 788 (Idaho 1981)

Montana

State v. Warren, 192 Mont. 436, 628 P.2d 292 (Mont. 1981)

Oklahoma

Nunley v. State, 601 P.2d 459 (Okla.Cr.App. 1979)
Frye v. State, 606 P.2d 599 (Okla.Cr.App. 1980)

Tennessee

State v. Williford, 824 S.W.2d 553 (Tenn.Cr.App. 1991)

Texas

Ex parte Colunga, 587 S.W.2d 426 (Tex.Cr.App. 1979)
Ex parte Reynolds, 588 S.W.2d 900 (Tex.Cr.App. 1979)
Sheets v. State, 606 S.W.2d 864 (Tex.Cr.App. 1980)
Walker v. State, 615 S.W.2d 728 (Tex.Cr.App. 1981)
Hernandez v. State, 636 S.W.2d 617 (Tex.App. – San Antonio 1982)
Davis v. State, 675 S.W.2d 331 (Tex.App. – San Antonio 1984)
Castaneda v. State, 682 S.W.2d 535 (Tex.Cr.App. 1984)
Cruz v. State, 690 S.W.2d 246 (Tex.Cr.App. 1985)
Matter of J.R.R., 696 S.W.2d 382 (Tex. 1985)
Martinez v. State, 705 S.W.2d 772 (Tex.App. – San Antonio 1986)
Westwood v. State, 711 S.W.2d 343 (Tex.App. – Texarkana 1986)
Vargas v. State, 736 S.W.2d 847 (Tex.App. – San Antonio 1987)
Moreno v. State, 761 S.W.2d 407 (Tex.App. – Houston [14th Dist.] 1988)
Moron v. State, 779 S.W.2d 399 (Tex.Cr.App. 1985)
Sheffield v. State, 847 S.W.2d 251 (Tex.App. – Tyler 1992)
Munoz v. State, 853 S.W.2d 558 (Tex.Cr.App. 1993)
McDuff v. State, 943 S.W.2d 517 (Tex.App. – Austin 1997)
Badillo v. State, 963 S.W.2d 854 (Tex.App. – San Antonio 1998)